92-694

No. 92 -

FILED
OCT 2 1992
OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1992

CHARLES LEWIS MCGRANAGHAN

Petitioner

vs.

CALIFORNIA

Respondent

Petition for Writ of Certiorari
To the Court of Appeal of California
Third Appellate District

LAURANCE S. SMITH
660 "J" Street, Suite 380
Sacramento, California 95814
Telephone (916) 446-6615

Attorney for Petitioner

QUESTIONS PRESENTED

1. *Where a defendant has made no attempt to hide or use presence in another state to thwart either investigation or process by California authorities – and has, in fact, voluntarily appeared in California in response to a state administrative subpoena served on him at his place of employment in Nevada – does the tolling of the statute based on the defendant's moving in interstate commerce by accepting employment in Nevada constitute an impermissible state–imposed burden on interstate commerce ? (U.S. Const. Art. I section 8.)*

2. Does a state deny equal protection of the laws and/or the privileges and immunities of citizens of the United States to a defendant who has moved openly in interstate commerce by extending the period of limitations applicable to him based on such open movement ? (U.S. Const. Amt XIV sec.1.)

(Blank page)

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED . . . 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT

CALIFORNIA'S TOLLING OF ITS STATUTE OF LIMITATIONS BASED ON ACCEPTANCE OF EMPLOYMENT IN NEVADA IS AN IMPERMISSIBLE RESTRAINT ON INTERSTATE COMMERCE 10

(a) Interstate Tolling in the Case of Non-Fugitives is Un Called For Given Modern Transportation And Communication Facilities. 12

(b) Interstate Travel is a Fundamental Right 14

CONCLUSION 17

APPENDIX "A" 18

APPENDIX "B" 32

TABLE OF AUTHORITIES

Cases:

Abramson v. Bronstein (9 Cir. 1990) 897 F. 2d 389 15

Bendix v. Midwesco Enterprises (1988) 486 U.S. 888. . . . . 10, 11, 12, 15

California v. Superior Court (1987) 482 U.S. 400 14

Cooley v. Board of Wardens of Port of Philadelphia (1852) 53 U.S. 912 How.) 299 16

Dew v. Appleberry (1979) 23 Cal.3d 630 [591 P.2d 509] 11

Edwards v. California (1941) 314 U.S. 160 15

Gibbons v. Ogden (1824) 22 U.S. (9 Wheat) 1 . . . 16

Jones v. Helms (1980) 452 U.S. 412 15

Kent v. Dulles (1958) 357 U.S. 116 15

Mounts v. Uyeda (1991) 227 Cal.App. 3d 111 [227 Cal.Rptr. 730] 15

Scherling v. Superior Court (1978) 22 Cal. 3d 493 11

State v. Cawley (NM 1990) 799 P.2d 574 11

State v. Sher (Wisc. 1990) 437 N.E.2d 878 11

Toussie v. United States (1970) 397 U.S. 112 13

Quill Corp. v. North Dakota (1992) __ U.S. __ [60 U.S.L.W. 4423] 16

United States v. Guest (1966) 383 U.S. 745 15

Wyoming v. Oklahoma (1992) __ U.S. __ [112 S.Ct. 789] 16

United States Constitution:

Art. I section 8 . . . . . 1, 15

Amendment XIV, sec. 1 1

Statutes:

United States:

18 U.S.C. 3182 14

18 U.S.C. 3290 13

28 U.S.C. 1257 (a) 3

California

Const. Art IV. section 2 14

Corporations Code section 25401 . . . . . 5, 6

Corporations Code section 25541 7

Penal Code section 803 12

Penal Code section 803(c) 13

Penal Code section 12022.6(a) 5, 6

Journals:

Developments in the Law - Statutes of Limitations (1950) 63 Harv. L.Rev. 1177 13

Miscellaneous:

Butterfield, *New Sexual Misconduct Charge Against Ex-Priest*, New York Times, September 24, 1992 Nat'l Ed. Pg A-8.

QUESTIONS PRESENTED

1. *Where a defendant has made no attempt to hide or use presence in another state to thwart either investigation or process by California authorities – and has, in fact, voluntarily appeared in California in response to a state administrative subpoena served on him at his place of employment in Nevada – does the tolling of the statute based on the defendant's moving in interstate commerce by accepting employment in Nevada constitute an impermissible state–imposed burden on interstate commerce ? (U.S. Const. Art. I section 8.)*

2. *Does a state deny equal protection of the laws and/or the privileges and immunities of citizens of the United States to a defendant who has moved openly in interstate commerce by extending the period of limitations applicable to him based on such open movement ? (U.S. Const. Amt XIV sec.1.)*

OPINIONS BELOW

The opinion of the California Court of Appeal, hird Appellate District, was filed on May 28, 1982. ttached as Appendix "A", it was not certified for ublication in the official reports. The Supreme ourt of California denied Petitioner's Petition for eview, August 12, 1992. This order is attached as ppendix "B".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are the Fourteenth Amendment and the Commerce Clause, Article I, section 8, clause 3.

Article I, section 8 provides in pertinent part:

"The Congress shall have the power
. . . . To regulate commerce with foreign nations, and among the several states and with the Indian Tribes. . . . ."

The Fourteenth Amendment provides in pertinent part,

"Section 1 . . . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On May 8, 1991, the District Attorney of Sacramento County, California filed information 96368 against appellant Charles Lewis McGranaghan. [1]

Count I alleged that "on or about and between the 13th day of April, 1982 and the 13th day of October, 1984" appellant sold a security to Nancy Petersen while misstating a material fact. (Cal. Corporations Code section 25401.)

It was alleged in connection with this count that appellant took funds and property with a value in excess of $25,000.00, to wit $60,000.00. (Penal Code section 12022.6, subdivision (a).)

It was also specially alleged that the offense could not have been discovered in the exercise of due diligence until December, 1984, and that appellant had continuously resided outside the State of California since July, 1985. (CT 372-373)

Count II alleged grand theft from Nancy Petersen at the same time mentioned in count I of the sum of $60,000.00

---

[1] The action was commenced for purposes of the statute of limitations August 23, 1989 with the filing of a complaint in municipal court. (CT 461)

It was alleged in connection with this count that appellant took funds and property with a value in excess of $25,000.00, to wit $60,000.00. (Penal Code section 12022.6, subdivision (a).)

Count III alleged that between May 13, 1982 and October 23, 1984 appellant offered to sell a security to Nancy Petersen by written or oral communication which included an untrue statement of fact. (Corporations Code section 25401.)

It was specially alleged under section 12022.6, subdivision (a) in connection with count III that the value of property taken was $40,000.

Count IV alleged the grand theft of $40,000.00 from Nancy Petersen at the same times alleged in count III. The section 12022.6 subdivision (a) allegation was repeated as to this count.

Count V alleged that between May 14, 1982 and October 23, 1984 appellant offered to sell a security by means of misrepresentation to Donald Petersen.

Count VI alleged the grand theft of $750.00 from Donald Petersen at the same time specified in Count V.

—Count VII alleged that appellant offered to sell a security to Donald Petersen by means of misrepresentation between May 14, 1982 and October 23, 1984.

It was specially alleged in connection with Count

VII that appellant took property of the value of $26,062.11 from Mr. Petersen.

Count VIII alleged grand theft of $26,062.11 from Mr. Petersen at the same time specified in Count VII.

Count IX alleged that between January 28, 1982 and October 23, 1984 appellant employed a scheme, etc. of deception in connection with the sale of securities to Nancy and Donald Petersen, in violation of Corporations Code section 25541.

Count X alleged that appellant offered to sell a security to Nancy Petersen by means of misrepresentation between June 5, 1982 and October 23, 1984.

Count XI alleged that appellant committed the grand theft of $100,000.00 from Nancy Petersen at the same time specified in Count X. A section 12022.6(a) enhancement was attached to this count.

Count XII alleged that appellant offered to sell a security to Donald Petersen by means of misrepresentation between June 5, 1982 and October 23, 1984.

Count XIII charged appellant with grand theft of $5,000.00 from Donald Petersen between June 5, 1982 and October 23, 1984.

Count XIV alleged that between June 5, 1982 and October 23, 1984 appellant engaged in a scheme of

deception, etc to sell securities to Nancy and Donald Petersen, in violation of section 25541.

It was also specially alleged as to each count that the offense could not have been discovered in the exercise of due diligence until December, 1984, and that appellant had continuously resided outside the State of California since July, 1985. (CT 372-391)

Pleas of "not guilty" were entered to all counts of the information (CT 394)

The cause was called for trial January 7, 1991. Appellant moved *in limine* to dismiss on grounds of the statute of limitations; ruling was deferred. A request for an election as to the time of discovery of the offense resulted in the prosecutor electing December, 1984 as the date. Jury selection then commenced. (CT 409)

A jury and three alternates were sworn January 9, 1991. (CT 411) Presentation of evidence commenced January 10, 1991. (CT 412)

The motion to dismiss on statute of limitations grounds was taken up January 14, 1991. The motion was denied. (CT 416)

The cause was argued January 16, 1991. (CT 419) The jury was instructed January 17, 1991, and commenced deliberations that day at 10:40 A.M. (CT 522)

The jury arrived at verdicts January 25, 1991. (CT 535, 536)

Appellant was found "guilty" on Counts I, II, III, IV, VII, VIII, IX, He was found "not guilty" on Counts V, VI, X, XI, XII, XIII, and XIV. (CT-537-550)

On February 27, 1991, the court placed appellant on probation for a term of five years on specified conditions, including service of 180 days in the county jail. (CT 608, 610-611)

Appellant filed a timely notice of appeal to the California Court of Appeal, Third Appellate District, March 19, 1991. (CT 615)

On May 28, 1992, the state court of appeal affirmed the judgment. On August 12, 1992, the Supreme Court of California denied a Petition for Review.

REASONS FOR GRANTING THE WRIT

CALIFORNIA'S TOLLING OF ITS STATUTE OF LIMITATIONS BASED ON ACCEPTANCE OF EMPLOYMENT IN NEVADA IS AN IMPERMISSIBLE RESTRAINT ON INTERSTATE COMMERCE

In *Bendix v. Midwesco Enterprises* (1988) 486 U.S. 888, this Court held that the tolling of a statute of limitations based on movement in interstate commerce is an impermissible restraint on such commerce by the state. California has flatly refused to implement that decision in either civil or criminal cases.

Under the prevailing California interpretation of tolling of the statute of limitations, reaffirmed in this case, a person is subject to prosecution for acts allegedly committed in California for an additional three years beyond the normal period of limitations should he or she leave the state. Other states have no limitation whatsoever on tolling.

California State courts adhere to a perfectly ludicrous count-the-days approach that adds a day to the period of limitations for each day absent from

the state. (*Scherling v. Superior Court* (1978) 22 Cal. 3d 493 [585 P.2d. 219]; *Dew v. Appleberry* (1979) 23 Cal.3d 630 [591 P.2d 509].) [2]

As we have suggested, other states have also ignored *Bendix* in even more egregious ways. The Wisconsin court in *State v. Sher* (Wisc. 1990) 437 N.E.2d 878 permitted charges of a 1978 boat theft to be filed in 1986 because the defendant had moved, quite openly, to Florida in 1982. Though Bendix was cited, it was only for the proposition that the Statute of Limitations does not establish a fundamental right. The command of *Bendix* to strictly scrutinize restraints on interstate commerce was studiously ignored, and the tolling statute upheld on a "rational basis" test with a citation to California's (pre-*Bendix*) *Scherling v. Superior Court*, supra.

In *State v. Cawley* (NM 1990) 799 P.2d 574, New Mexico permitted the 1988 filing of charges of sexual assault allegedly occurring in *1968* because the defendant had lived in Texas for eleven years in the interim, tolling a ten-year statute. *Cawley* cites the

---

[2] The perniciousness of such an approach, should it become widespread, is easy to imagine. Someone living in Kansas City, Kansas and working across the river in Kansas City, Missouri would have no protection. Nor would a government official living in Maryland or Virginia who commuted each day to the District of Columbia.

California *Scherling* decision, but curiously does not cite *Bendix.* [3]

(a) Interstate [4] Tolling in the Case of Non-Fugitives is Un Called For Given Modern Transportation And Communication Facilities.

This case presents a classic illustration of why Legislatures have established a period of limitations within which an action must be brought. (Cal. Penal Code section 803) Here, years of inaction and bureaucratic sloth were capped by the filing of criminal charges against Petitioner *eight years* after

---

[3] It does not appear that certiorari was sought from either of these state decisions. A recent news report indicates that a former New Bedford priest has been charged with sex offenses allegedly occurring *30 years ago* based on the fact that the church moved him to another state in 1967. Butterfield, *New Sexual Misconduct Charge Against Ex-Priest*, New York Times, September 24, 1992 Nat'l Ed. Pg A-8.

[4] We intend to raise only the question of tolling between states, because that is the only question the facts present. The question of tolling where a defendant has traveled to a foreign country would be influenced by such things as the existence of an extradition treaty and other matters which are inapplicable in the domestic context.

the conduct in issue and seven years after the complainants became suspicious enough to consult an attorney, indicating their discovery of alleged fraud. (Cal. Penal Code section 803(c).)

The criminal charges came almost as an afterthought when it became apparent civil remedies would be ineffective in obtaining repayment of investment losses.

The result was a trial in which no witness for either side could testify from a clear memory, and in which potential exculpatory business record evidence had become unavailable due to destruction of records. Prevention of trials based on stale evidence is of course a main goal of statutes of limitations. (*Toussie v. United States* (1970) 397 U.S. 112, 114-115)

Tolling is a concept invented in 1705 when the British Parliament extended limitations for periods a defendant was "beyond the seas" [5] This idea made perfect sense given the technology of the 18th century. It may yet make sense in the case of a defendant who becomes an interstate fugitive. Notably, the statute of limitations applicable to federal crimes is is tolled only by "any person fleeing from justice" (18 U.S.C. 3290.)

---

[5] *Developments in the Law - Statutes of Limitations* (1950) 63 Harv. L.Rev. 1177, 1224)

In this age of air travel and interstate highways, when applied to a California resident who openly takes a job teaching school in Nevada, tolling is an anachronistic relic which harms interstate commerce. [6]

(b) Interstate Travel is a Fundamental Right

The right to travel was deemed one of the attributes of personal liberty under the common law in the time of Blackstone. [7] The right to interstate travel has accordingly been declared a necessary element of a federal union. (*Shapiro v. Thompson* (1969) 394 U.S. 618, 629-630.) Rights of free speech and free association - here, with family members or

---

[6] Past uncertainty over the power of an asylum state to dishonor the extradition warrant of a sister state may have served as a justification for tolling in the past. That uncertainty was put to rest in 1987 when this Court held that the Extradition Act requires an asylum state must deliver a fugitive upon request of the governor of a sister state. (*California v. Superior Court* (1987) 482 U.S. 400. See Const. Art IV. section 2; 18 U.S.C. 3182)

[7] 1 Blackstone, *Commentaries on the Common Law of England* sec. 134.

through employment - are often tied to the right to travel. (*Kent v. Dulles* (1958) 357 U.S. 116.)

State action which burdens interstate commerce is a usurpation of the exclusive authority of Congress to regulate interstate commerce (U.S. Const. Art. I section 8). "Commerce" includes persons, regardless of their personal station. (*United States v. Guest* (1966) 383 U.S. 745, 757-759; *Edwards v. California* (1941) 314 U.S. 160) The right to travel in interstate commerce is fundamental. (*Jones v. Helms* (1980) 452 U.S. 412, 418)

Yet notwithstanding the Ninth Circuit's specific determination that California's tolling policies are deficient under *Bendix* (*Abramson v. Bronstein* (9th Cir. 1990) 897 F. 2d 389), the state court of appeal has dismissed appellant's request to apply this Court's *Bendix* decision to this case by curtly stating, "We decline to do so". (Opn. App. "A" pg. 19) [8]

It was no more difficult for the state to contact appellant at his employment in Carson City, Nevada than had he taken a job in San Diego. Given that California investigators were based in Sacramento, it actually was less so. There is therefore no basis in

---

[8] Another California court of appeal declined to follow the Ninth Circuit in a published decision. *Mounts v. Uyeda* (1991) 227 Cal.App. 3d 111 [227 Cal.Rptr. 730].

reason for discriminating against him because he chose to move openly in interstate commerce by working a few miles outside the California border.

California tolling provisions thus inhibit interstate commerce. They chill the right to travel and to conduct business in other states. They interfere with the rights of persons out-of-state to offer employment to or otherwise do business with California residents.

Over the past one hundred and fifty years [9], thus Court has held in many contexts that state laws having such an effect are void, as earlier this year in *Wyoming v. Oklahoma* (1992) __ U.S. __ [112 S.Ct. 789].

Most recently, in *Quill Corp. v. North Dakota* (1992) __ U.S. __ [60 U.S.L.W. 4423, 4425], the Court said,

> "As justice Johnson noted in *Gibbons v. Ogden* (1824) 22 U.S. (9 Wheat) 1, 231-232, 239 the commerce clause is more than an affirmative grant of power. It has a negative sweep as well. The clause . . . by its own force prohibits certain state actions that interfere with interstate commerce."

---

[9] *Cooley v. Board of Wardens of Port of Philadelphia* (1852) 53 U.S. (12 How.) 299.

The action of California in penalizing Petitioner for taking a job in an adjacent state is an action prohibited by that negative sweep.

Conclusion

Certiorari should be granted, and the judgment should be reversed as barred by limitations.

Respectfully submitted,

LAURANCE S. SMITH

APPENDIX "A"

COURT OF APPEAL OF THE STATE
OF CALIFORNIA IN AND FOR
THE THIRD APPELLATE DISTRICT
(Sacramento)

No. C 010754
(Super Ct No. 96368)
FILED May 28, 1992
Robert L. Liston, Clerk
[Original page No's in brackets.]

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Respondent
vs.
CHARLES LEWIS McGRANAGHAN
Defendant and appellant

---

[1] A jury convicted defendant Charles Lewis McGranaghan of three counts of selling securities by means of a false statement or omission (Corp. Code sec. 25401 – Counts 1,3, and 7), three counts of grand theft (Pen. Code sec. 487, subd. 1 – counts 2, 4, and 8, [1] and one count of using fraud or deceit

---

[1] This code section is cited in the record as 487.1.
All statutory references are to the Penal Code

in the sale of a security (Corp. Code sec.25541–count 9.) As to each count, the jury found [2] that McGranaghan took property in excess
of $25,000 in value. The court placed McGranaghan on five years' probation on condition that he serve one hundred eighty days in county jail and provide restitution in the amount of $126,812.11.

On appeal, McGranaghan contends reversal is required because (1) the charges were barred by the statute of limitations, (2) the People failed to prove he appropriated property to his own use in the grand theft counts, and (3) he received no Miranda[2] warning when questioned by an investigator from the Department of Corporations. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Nancy Petersen wanted to invest the $400,000 settlement she received from american airlines in connection with the death of her husband. A counsellor referred her to McGranaghan.

After meeting with McGranaghan in the late summer or fall of 1981, Nancy Petersen and her husband Donald made small investments in individual

---

unless otherwise indicated.

[2] Miranda v. Arizona 384 U.S.436 [16 L.Ed 2d. 694].

retirement accounts. In the spring of 1982, Nancy Petersen invested $100,000 in what McGranaghan called a trust deed savings program. McGranaghan told the Petersens he would use their money to purchase second deeds of trust. He promised to deposit the monthly interest payments in he Petersen's account with the Franklin Fund. McGranaghan also represented Nancy Petersen could have [3] her money back when the trust deeds became due and payable.

The Petersens also invested over $100,000 in a limited partnership called PMC Development Fund. McGranaghan said he would use those funds to purchase commercial property in Fair Oaks. He told the Petersens he would buy them out on 60 days' notice if they wanted to withdraw from the program.

After October, 1982, interest payments on the trust deed investments were sporadic. The Petersens and McGranaghan exchanged correspondence. McGranaghan did not make the interest payments or return the principal as they requested. The Petersens received the last interest payment on the trust deeds in February 1984.

The Petersens filed a civil lawsuit against McGranaghan on July 30, 1984, alleging breach of contract, fraud, and misrepresentation. McGranaghan's subsequent bankruptcy stayed the civil action.

The first hint of McGranaghan's dishonesty came from the Petersens' attorney in January, 1984. The first time Nancy Petersen believed a crime had occurred was in July or August 1985 when she read a copy of the attorney's letter to the Department of Corporations.

The Department of Corporations began to investigate McGranaghan's activities in July or August 1985 after receiving the letter from the Petersens' Attorney. Jeff Robertson, an examiner with the Department of Corporations, [4] reviewed McGranaghan's bank statements and other financial records. Paul Rutledge, a Department of Corporations investigator, interviewed McGranaghan on June 16, 1987. On that occasion, McGranaghan admitted he had commingled funds from various accounts. He initially claimed all interest paid the Petersens was from monies earned on the trust deeds. He then admitted making interest payments from a separate fund which included the principal the Petersens originally invested with him. With respect to the trust deed savings program in general, McGranaghan told Rutledge he had "muffed it".

The Department of Corporations investigation led to the filing of a criminal complaint and issuance of

an arrest warrant on August 23, 1989. [3] The District Attorney filed a 14-count information on May 8, 1990. The information alleged the offenses were not and could not have been discovered until after December, 184 within the meaning of section 803, subdivision (c).

McGranaghan worked as a teacher in Carson CIty, Nevada from 1985 to the time of trial.

At trial, the court overruled a defense objection to Rutledge's testimony concerning his interrogation of [5] In addition, McGranaghan unsuccessfully moved to dismiss on grounds the action was barred by the statute of limitations.

Discussion

I

Statute of Limitations

McGranaghan challenged the court's refusal to dismiss the information on grounds the criminal action is barred by the limitations period and tolling provisions set forth in sections 801 and 803,

---

[3] We take judicial notice of the felony arrest warrant issued by the Sacramento Municipal Court in People v. McGranaghan No. 89F06093, on August 23, 1989. (Evid. Code sec's 452, subd. (d)(1) and 459.)

subdivisions (c)(1) and (3), and (d). [4] If both statutes apply, the prosecution had six years from discovery of McGranaghan's unlawful conduct to [6] commence a criminal action against him. [5] Specifically,

---

[4] Section 801 provides: "Except as provided in sections 799 and 800, prosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after commission of the offense."

Section 803, subdivision (c)(1) and (3) states in part: "A limitation of time prescribed in this chapter does not commence to run until discovery of an offense described in this subdivision. This subdivision applies to an offense punishable by imprisonment in the state prison, a material element of which is fraud. . . including, but not limited to, the following offenses: [par.] (1) Grand theft of any type; . . . a[par.] A violation of section 25541 of the Corporations Code."

Section 803,subdivision (d) states: "If the defendant is out of state when or after the offense is committed, the prosecution may be commenced as provided in Section 804 within the limitations of time prescribed by this chapter, and at no time up to a maximum of three years during which the defendant is not within the state shall be a part of these limitations.

[5] Prosecution for an offense "commences when any of the following occurs: "(a) An indictment or information is filed. "(b) A complaint is filed with an inferior court charging a public offense of which the inferior court has original trial jurisdiction. "(c) A case is certified to the Superior Court. ("d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the degree of particularity required for an indictment, information, or complaint. (Sec. 804.)

McGranaghan argues: (1) the Petersens were on inquiry notice of the unlawful acts in February 1983 when interest payments cease, (2) the tolling period described in section 803, subdivision (d) creates an impermissible burden on interstate commerce. We reject these arguments.

A. Discovery of the Criminal Offenses:

Section 803, subdivision (c) refer to "discovery" of the offense without defining that term. However, case law says the limitations period starts to run on the date the crime is discovered by either the victim or responsible law enforcement authorities. (People v. Zamora (1976) 18 Cal3d 538, 571-572.) The burden is on the prosecution to prove by a preponderance of the evidence the "'legal discoverer' (1) knew no facts constituting constructive notice of the [7] crime, (2) exercised reasonable diligence, and (3) did not negligently perform his duties so as to allow the crime to remain undiscovered. (People v. Crossman (1989) 219 Cal.App.3d 476, 480.) "The crucial determination is whether law enforcement authorities or the victim had actual notice of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud." (People v. Zamora, supra, 18 Cal.3d at p. 562.)

The parties agree the action against McGranaghan was commenced on August 23, 1989. [6] To avoid the six-year time bar, McGranaghan's criminal conduct would have to have been [8] "discovered" after August 31, 1983.

In denying McGranaghan's motion to dismiss, the court determined the allegations concerning discovery were insufficient as a matter of law. Leaving the question reasonable diligence to the trier of fact, it instructed the jury it must return a verdict of not guilty if it found the action was not commenced within the prescribed period. [7] We [9] infer from the

---

[6] McGranaghan stated, and the Attorney General apparently agreed, "[t]he action was commenced for the purposes of the statute of limitations August 23, 1989 with the filing of a complaint in municipal court." This statement is incorrect. Under section 804, subdivision (b), a criminal action commences with the filing of a complaint in municipal court for offenses over which that court had original jurisdiction. The municipal court does not have original jurisdiction over felonies. (Sec. 1462, subd. (a)) However, the action did commence on the same date with the issuance of an arrest warrant. (Sec. 804, subd. (d).)

[7] The court gave the following instructions on the statute of limitations:

"This action was commenced on August 23, 1989. The defendant may be convicted of grand theft or Corporations Code violations only if the theft or Corporations Code violation was discovered within three years of the commencement of the action. However, the defendant may not be convicted of

guilty verdicts the jury found the action timely filed. The facts support the court's ruling and the jury's implied finding on the statute of limitations question.

McGranaghan's argument regarding the sufficiency of the evidence is based largely on Nancy Petersen's initial testimony that interest payments ceased in

---

theft or Corporations Code violations if you find that in the exercise of reasonable diligence on the part of the alleged victim or the criminal law enforcement authorities that theft or Corporations Code violations could have been discovered at a time more than three years before the commencement of the action.

"However, the time a defendant is absent from the this State following the commission of the crime up to a maximum of three years is excluded in determining the three year period.

"You are the exclusive judges of whether the defendant was absent from the state during the time in question.

"The word discovered as used in this instruction does not mean mere awareness of loss, nor does a mere loss in and of itself suggest a likelihood of theft or Corporations Code violations. Discovered means an awareness that there has been a loss and that it was caused by criminal agency, means or act.

"Reasonable diligence means the usual care exercised by the ordinary person in the conduct of his or her affairs.

"Even though the People must prove that the defendant is guilty beyond a reasonable doubt, the People must only prove by a preponderance of the evidence that the theft or Corporations Code violation was discovered as herein defined within three years of the commencement of the action.

"If you find that this action was not commenced within the prescribed period, you must find the defendant not guilty."

February, 1983. She later corrected that testimony to state the last payment was made on February 10, 1984.

The Petersens became concerned about their investment and discussed obtaining a civil attorney in the fall of 1982. They corresponded with McGranaghan between March 13, 1983 and February 24, 1985, in an effort to obtain the return of their investments. In an August 15, 1983 letter, McGranaghan reassured the Petersens their investment would continue to grow until he was able to buy them out. An October, 1983 letter from McGranaghan included reports on payments he said were current. He indicated he was still looking for investors to purchase the Petersens' interest in the limited partnership and the trust deed program. Donald Petersen testified the first suggestion of dishonesty came form their attorney in January, 1984. There is no evidence the Petersens or law enforcement officials were aware, or should have been aware, the Petersens were victims of anything more than bad investments before August 23, 1983. [10]

B. Tolling of the Statute of Limitations

After stipulating he was employed in Carson City, Nevada, continuously between 1985 and the time of trial, McGranaghan contends such evidence is insufficient to establish out-of-state residence for

the purpose of tolling the statute of limitations. McGranaghan offered no evidence at trial to rebut the reasonable inference he resided in Nevada. Accordingly, we conclude that there was sufficient factual basis to support the implied finding he was absent from the state during the period in question.

C. The Commerce Clause:

McGranaghan acknowledges the California Supreme Court rejected a constitutional attack on the criminal tolling statute in Scherling v. Superior Court (1978) 22 Cal3d 493, but invites us to depart from that ruling in light of the United States Supreme Court decision in Bendix v. Midwesco Enterprises (1988) 468 U.S. 888 [100 L.Ed.2d 896]. We decline to do so.

Bendix involved an Ohio civil statute which tolled the four-year statute of limitations for breach of contract or fraud for any period a person or corporation was not present in the state. To be present in Ohio, a foreign corporation was required to appoint an agent for service of process (486 U.S. at p. 889 [100 LEd. 2d at p. 901]. Noting the defendant corporation was at all times amenable to service under Ohio's long-arm statute, the United States [11] Supreme Court found the burden on imposed on interstate commerce exceeded any state interest Ohio might advance. (Id. at p. 891 [100 L.Ed.2d at p. 902].)

State interests may weigh more heavily when a criminal tolling statute is challenged on constitutional grounds. In Scherling, the California Supreme Court found the state had an interest in assuring the defendant was present locally to enhance the possibility of detection, and to avoid the burdens of extradition proceedings. (Scherling v. Superior Court, supra 22 Cal.3d at p. 501.) Applying the rational relationship standard, it concluded former section 802 did not deny the defendant equal protection of law or violate his right to travel. (Id. at p. 502.) Scherling is controlling on the issue before us.

II

Sufficiency of Evidence of Grand Theft

The jury convicted McGranaghan of grand theft in counts 2, 4 and 8. McGranaghan concedes he "did things with the Petersens' money other than what he claimed he would do." but argues he cannot be convicted of grand theft because there is no evidence he converted the property to his own use. McGranaghan misstates the law.

The court properly instructed the jury on the elements of theft by trick and device, embezzlement, and theft by false pretenses. Specifically, it told the jury: (1) theft by trick or device involves a "specific

intent to deprive the other person permanently of his or her property" (see 2 Witkin & Epstein, Ca. Criminal Law (2d ed. 1988) Crimes Against Property Sections 574, 575, 584, pp. 651-653, 660); (2) embezzlement consists of appropriating or converting property "to his own use or purpose. . .with the specific intent to deprive the other person of his or her property" (see People v. Stein (1973) 32 Cal. App. 3d 235, 241);[8] and (3) theft by false pretenses involves inducing another person to part with his or her property through intentional misrepresentation (see People v. Randono (1973) 32 Cal. App. 3d 164, 172). (Emphasis added.) The prosecution had to prove McGranaghan intended to use the Petersens' money for some purpose which would permanently deprive them of it. Viewing the evidence in the light most favorable to the prosecution, we conclude circumstantial evidence supports the verdict on the grand theft counts.

Jeff Robertson traced the flow of money the Petersens invested with McGranaghan. Of the Petersens' total investment of $231,062, the $126,812 invested in the trust deed savings program was

---

[8] Sections 504 and 506, which pertain to embezzlement by officers of private associations and fiduciaries, refer to fraudulent appropriation for "any use or purpose not in the due and lawful execution of his trust, . . ." (Emphasis added.)

placed in two accounts at Pacific Coast Savings and Loan. This money was commingled with other funds in a Bank of America account in the name of [13] Pension Management Company (PMC). McGranaghan had control over the PMC account.

The PMC account at Bank of America totaled $194,147. [9] Robertson determined $180,585 of the total was transferred to seven other catagories of accounts, and $126,500 was transferred to another Bank of America account in the name of the Fair Oaks group, also controlled by McGranaghan.

McGranaghan used funds in the PMC account to make other payments. He used $22,000 to pay off a third-party loan to a party identified as Olney. There was a $20,000 trust deed loan to people by the name of Satterwhite. Payments of $4,000 and $7,860 [10] went to accounts with the Franklin Fund. Nancy Petersen received an "interest payment" of $3,107.

The $126,500 in the Fair Oaks Group account was supplemented by $303 for a total of $126,803. Of this

---

[9] During his testimony, Robertson used a flow chart which was admitted as Exhibit 36. Each juror received a copy of the chart. Robertson's testimony in the reporter's transcript occasionally deviates from the figures set forth in the chart. The $194, 147 figure appears in the flow chart as $190, 447.

[10] 10 The flow chart shows this payment to be in the amount of $2,860.

amount, $65,586 [11] was paid in connection with properties in [14] escrow, none of which involved purchases of trust deeds. Other disbursements included $6,000 to an account at the Crocker Bank called the Real Food Company, and $1,299 to McGranaghan's wife. None of the $118,829 disbursed from the Fair Oaks Group account was used to purchase deeds of trust.

Robertson also traced the remaining $104,000 the Petersens invested. This money was deposited in a Franklin Fund account called the PMC Development Fund. McGranaghan transferred $30,369 to a PMC Development account at Bank of America. Although the commingling of funds made it difficult for Robertson to day what amount of the Petersens' money was used to buy commercial property as promised by McGranaghan, Robertson estimated it to be "(q)uite a bit less than 50 (percent)" of the original $104,000 investment. Of the initial $126,000 investment, only the Satterwhite loan could be identified as a property loan, and it was not made in a manner which linked it to the Petersens.

McGranaghan concedes the speed with which he moved the Petersens' money into his other partnership accounts indicated he intended to make

---

[11] Here the reporter's transcript shows the figure as $5,586. The Attorney General states the flow chart shows the correct sum of $65,586.

those transfers when he accepted their money. However, even ignoring such concessions, there is ample circumstantial evidence McGranaghan intended to permanently deprive the Petersens of their investment. Shortly after explaining his plan to use their money to buy trust deeds and commercial property, he diverted the funds to other accounts and used it to pay off [15] outstanding obligations. McGranaghan returned a small portion of the invested funds to Nancy Petersen in the guise of interest. When questioned, McGranaghan reassured the Petersens their investment was continuing to grow. A jury could have inferred McGranaghan must have known he could not pay the money back.

III

Miranda Warning

Paul Rutledge, the Department of Corporations investigator, interviewed McGranaghan at his attorney's office in connection with the subpoena of his business records. McGranaghan argues the court should have excluded the testimony on grounds Rutledge failed to advise him of his Miranda rights before the questioning began. We conclude the court properly admitted statements made my McGranaghan at the interview with Rutledge.

Miranda v. Arizona, supra, 384 U.S. 439 [16 K,Ed, 2d 694], requires appropriate warnings when an individual is subjected to custodial interrogation, that is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Id. at p. 444 [16 L. Ed.2d at p. 706].) The sole concern is governmental coercion. (People v. Kelly (1990) 51 Cal. 3d 931, 951.) Here the record shows McGranaghan was questioned by a peace officer. However, he was not arrested before or after the [16] questioning. The only question is whether he was deprived of his freedom of action to the extent he was "in custody." There is sufficient evidence to support the court's ruling he was not.

Before the interview, the Department of Corporations served McGranaghan with a subpoena duces tecum. The subpoena did not require McGranagan's personal appearance. The actual, personal interview was scheduled either directly with McGranaghan or through his attorney, Louis Hackett. At this point in the Department of Corporations investigation, McGranaghan was suspected of criminal conduct.

During the suppression hearing, defense counsel asked McGranaghan what language Robertson, the Department of Corporations examiner, used in requesting his appearance at the meeting. In his

response McGranaghan did not describe the specific language used, but stated: "My reaction to his request was that this was a demand performance, that I would have to be in Sacramento or they would come to Nevada to see me. And I said I don't really regard driving to Sacramento as a big chore because I do it a lot. And I agreed to drive down to Sacramento to see him at Mr. Hackett's office." The location of the meeting was established by mutual agreement between McGranaghan and Robertson. McGranaghan thought his attorney's office would be a convenient place to meet because some of the records were there.

Present during the interview in Hackett's office were McGranaghan, Rutledge, and Jeff Robertson, the Department of Corporations examiner. Hackett knew Rutledge and Robertson were from the Department of Corporations and their general purpose in wanting to meet with McGranaghan. Hackett said he did not need to be present, and left the room before the interview began. McGranaghan showed no anxiety during the interview.

McGranaghan talked with his attorney about the meeting before it took place. Hackett told McGranaghan it was a normal investigation by the Department of Corporations. McGranaghan was unaware Rutledge was a peace officer until the interview ended. He did not know Rutledge was

conducting a criminal investigation. McGranaghan had the distinct impression from Robertson the interview was going to be a deposition. "[He] under[stood] that a responsible citizen [he had] to answer questions."

McGranaghan said he felt fear toward the end of the interview. He said, "[I]t occurred to [him] as time passed that this was not a simple interview or interrogation to determine facts and clarifications, that at one point about twenty minutes before it ended Mr. Robertson's language became very abusive and accusative. . . .(Par.) He referred to some of [his] transactions as deceitful, as incriminating, et cetera."

McGranaghan's single reference to fear and abusive language is insufficient to support the contention he was subjected to the functional equivalent of custodial interrogation. In these circumstances, the fact the Department of Corporations has focused its investigation on him is of no legal consequence. (Beckwith v. United States (1976) 425 U.S. 341, 347 [48 L.Ed.2d 1,8].)

However, even if we were to view the interview with Rutledge as custodial interrogation, which we do not, we conclude the purported error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710].) McGranaghan's admissions to Rutledge were merely cumulative of Robertson's detailed testimony about

McGranaghan's business accounts. Significantly, in his brief on appeal, McGranaghan does not claim he was prejudiced by Rutledge's testimony.

DISPOSITION

The judgment is affirmed.

NICHOLSEN, J.
We Concur:
PUGLIA, C.J.
SIMS,J.

APPENDIX "B"

SUPREME COURT OF CALIFORNIA

In Bank

August 12, 1992

Appellant's petition for review DENIED.

LUCAS, CJ.